No. 90-5551

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JOSEPH F. SPANIOL, JR.
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In The

Supreme Court of the United States

October Term, 1990

EDWARD HAROLD SCHAD, JR.,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The
Arizona Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. The Sixth Amendment requires states to provide for trial by jury in criminal matters involving serious offenses. In federal criminal trials, that includes a requirement that the jurors return a unanimous verdict.

The questions presented are:

A. Whether petitioner waived any right to unanimity by failing to request a specific verdict form?

B. Whether the unanimous-verdict doctrine applies to state capital offenses?

C. Whether the verdict in this case satisfied the unanimity doctrine described in *Johnson v. Louisiana* and *Apodaca v. Oregon*?

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E. Whether the Arizona first-degree murder statute complies with the specific-unanimity doctrine if that doctrine is applicable to the states?

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2B. Whether robbery is a lesser-included offense of first-degree murder under the statutory-elements test as applied to the Arizona first-degree murder statute?

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STATEMENT OF THE CASE

On August 9, 1978, a highway worker discovered a body in some bushes near the roadway south of Prescott, Arizona. (R.T. of June 19, 1985, at 287.) The body was in an advanced stage of decomposition reflecting that death had occurred up to a week before the discovery. (R.T. of June 20, 1985, at 375.) An autopsy revealed that the cause of death was asphyxia due to a rope found tied around the neck. (R.T. of June 19, 1985, at 361.) The circumference of the loop in the rope measured 10-1/2 inches. (R.T. of June 20, 1985, at 373.) The body was not identified at that time.

On September 8, 197[illegible], Detective Halderman of the Salt Lake City Police Department received information that Edward Schad (hereinafter petitioner), a probationer, was in the city and in possession of a stolen automobile. (R.T. of June 21, 1985, at 634.) Petitioner was arrested the next day driving a Cadillac registered to Lorimer Grove, a 74-year-old resident of Bisbee, Arizona. (*Id.*) From petitioner, Halderman recovered credit card receipts in the name of Larry Grove and a New York traffic citation issued to Edward Schad. (*Id.* at 641.) Inquiries into the whereabouts of Larry Grove led to the final identification of the body discovered near Prescott, Arizona. Petitioner was now a suspect in a murder case.

Several factors supported that suspicion. On August 3, 1978, Officer Richardson of the Arizona Highway Patrol had discovered an abandoned Ford north of Flagstaff, Arizona. (R.T. of June 20, 1985, at 454-57.) This vehicle had been rented by petitioner in Utah on December 31, 1977, and never returned. (*Id.* at 414.) It was

reported stolen on January 3, 1978. (*Id.* at 416.) When information linked Schad with the murder of Larry Grove, the police searched the impounded Ford. In the trunk of that vehicle, they found a mirror device that Mr. Grove had invented to assist in maneuvering his car to attach his travel trailer. (R.T. of June 19, 1985, at 342-43; R.T. of June 20, 1985, at 495.) This discovery linked petitioner to Mr. Grove.

Mr. Grove had been murdered sometime between August 1, when he left Bisbee to visit his sister in Washington state, and August 9, when his body was discovered. When petitioner was arrested 1 month later, he was in possession of Mr. Grove's credit cards. (R.T. of June 21, 1985, at 823.) He also possessed a number of credit card receipts reflecting charges to those cards. Expert witnesses testified that petitioner signed those receipts in the name of Larry or Lorimer Grove. (R.T. of June 25, 1985, at 945.) Testimony established that petitioner began using Grove's credit cards in Benson, Arizona, on August 2, 1978, the day after Mr. Grove left Bisbee, Arizona, and continued to charge to those cards as he travelled back and forth across the United States until September 7, 1978, in Salt Lake City, the day before he was arrested. (R.T. of June 25, 1985, at 976.)

At the time of petitioner's arrest, his girlfriend was wearing a diamond ring she said came from petitioner. That ring was identified at trial as belonging to Mr. Grove. (R.T. of June 21, 1985, at 783; R.T. of June 20, 1985, at 574.)

Petitioner was stopped for speeding in New York while driving Mr. Grove's Cadillac. When he was unable

to provide registration for that vehicle, he explained that he was transporting the vehicle for an elderly gentleman named Larry Grove. (R.T. of June 20, 1985, at 553.)

In addition, petitioner made statements to John Duncan that implicated him in the murder. He told Duncan that the Cadillac was stolen and that he would deny being in Arizona, particularly Tempe and Prescott. He also told Duncan to destroy any and all credit card receipts that he could find in petitioner's billfold. (R.T. of June 21, 1985, at 819, 824, and 825.)

The Yavapai County Grand Jury charged petitioner with one count of first-degree murder. (J.A. at 2.) The first trial took place in 1979, and resulted in a conviction of first-degree murder and imposition of the death penalty. The Arizona Supreme Court affirmed both the conviction and the sentence. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981), *cert. denied*, *Schad v. Arizona*, 455 U.S. 983 (1982). Petitioner did not raise juror unanimity or lesser-included offense as issues in that appeal.

Petitioner filed a petition for post-conviction relief which led to the grant of a new trial. The Arizona Supreme Court held that the trial court's failure to define robbery was fundamental error when robbery was the underlying felony upon which the first-degree murder conviction was premised. *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984). There was no issue of juror unanimity or lesser-included offense.

Retrial began on June 19, 1985. The focus of the defense, from opening statement through cross-examination and concluding with closing argument, was that someone other than petitioner had killed Mr. Grove. (*See*,

e.g., R.T. of June 19, 1985, at 283-84; R.T. of June 27, 1985, at 1364-66, 1373-76, 1381.) Petitioner did not seek a specific-unanimity instruction, nor did he request separate verdicts on murder with premeditation and murder committed during a felony. He did request that the trial court give the jurors the option of finding him guilty of theft, a crime that he argued constituted a lesser-included offense of murder committed during a felony. (J.A. at 3-4.) The trial court denied that request. (*Id.* at 5.)

The trial court instructed the jurors that first-degree murder is murder which is the result of premeditation or that occurs during an attempt to commit robbery. (J.A. at 26-27.) It also instructed that the jurors could find petitioner guilty of the lesser-included offense of second-degree murder. (*Id.*) The possible verdicts, to which petitioner did not object, were guilty of first-degree murder, guilty of second-degree murder, and not guilty. (*Id.* at 5.) During closing arguments, both counsel addressed the alternate methods by which first-degree murder could be committed; either by premeditation or during the course of a robbery. (I.D. at 6-7; R.T. of June 28, 1985, at 1358.) The jurors returned a unanimous verdict of guilty of first-degree murder. (*Id.* at 1411-13.)

The trial court conducted a hearing at which both aggravating and mitigating evidence was presented. (R.T. of Aug. 22, 1985.) On August 29, 1985, the trial court entered its judgment of guilt and read the special verdict. It found the existence of three statutory aggravating circumstances and no mitigating circumstances sufficient to call for leniency, and imposed the death penalty as required by law. (R.T. of Aug. 29, 1985, at 2-10.)

The automatic appeal raised 13 issues of alleged error. (Opening Brief, Arizona Supreme Court.) Issue II alleged that the trial court committed fundamental error by failing to instruct the jurors and to give a form of verdict on robbery as a lesser-included offense of murder committed in the course of a felony. (*Id.* at 17-21.) The Arizona Supreme Court held that there is no lesser-included offense to the crime of first-degree murder committed in the course of a felony. Therefore, robbery was not a lesser-included offense on which an instruction and verdict could be based. (J.A. at 39-40.)

Petitioner argued in Issue XI that the trial court committed error by failing to submit separate verdict forms for murder by premeditation and murder that occurred in the course of a felony. (Opening Brief, Arizona Supreme Court at 50.) The Arizona Supreme Court rejected that contention citing the rule in Arizona that "first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder." (J.A. at 41.) It rejected all of petitioner's contentions and affirmed the conviction and sentence. (*Id.* at 55.) Petitioner then petitioned this Court for certiorari.

SUMMARY OF ARGUMENTS

ISSUE I – JURY VERDICT

A. Petitioner's failure to raise the specific-unanimity issue in the trial court restricts the scope of this Court's review to that set forth by the "plain error" rule: highly prejudicial error that affects the substantial rights of petitioner. *United States v. Payseno*, 782 F.2d 832 (9th

Cir. 1986). Since the issue does not rise to a constitutional level, and since the evidence of both methods of commission is overwhelming and uncontested, petitioner has failed to demonstrate "plain error."

B. The unanimity-doctrine of the Sixth Amendment does not extend to the states via the Fourteenth Amendment because unanimity is not considered an essential feature of that amendment. "A requirement of unanimity, however, does not materially contribute to the exercise of [the] common sense judgment [of the group of laymen that lies between the accused and his accuser]." *Apodaca v. Oregon*, 406 U.S. 404 (1972). Nor does the due process doctrine of the Fourteenth Amendment require a unanimous verdict to satisfy the reasonable doubt standard mandated in capital cases. *Johnson v. Louisiana*, 406 U.S. 356, 363 (1972). Therefore, no federal constitutional foundation exists for petitioner's contention that a specific-unanimity instruction was required in the present case.

C. Article II, § 23 of the Arizona Constitution requires juror unanimity in all criminal cases. The jurors in this case were instructed that their verdict must be unanimous. The federal unanimity doctrine was satisfied in this case regardless of its application to the states.

D. The specific-unanimity doctrine is a rule of procedure applicable only to federal criminal trials. Rule 31(a), Fed. R. Crim. P.; *United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990). If it is a constitutional right founded in the Sixth Amendment, *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), it does not apply to the states because it is a subcategory of the general-unanimity doctrine that

does not extend to the states. *Apodaca v. Oregon*, 406 U.S. at 411-12.

E. The specific-unanimity doctrine discussed in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), applies only to a single charge that contains two distinct conceptual groups of acts sufficiently different to cause a genuine possibility of juror confusion. *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990). If this federal doctrine is extended to the states in capital cases, the Arizona interpretation of the first-degree murder statute is consistent with the federal doctrine (first-degree murder is one offense). *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982). How a criminal commits the offense is constitutionally irrelevant. *State v. Vickers*, 138 Ariz. 450, 675 P.2d 710 (1983), *cert. denied*, *Vickers v. Arizona*, 110 S. Ct. 3298 (1990).

F. If the lack of a specific-unanimity instruction is considered error of constitutional magnitude, that error was rendered harmless beyond a reasonable doubt in this case by the overwhelming evidence of guilt with respect to both methods of committing first-degree murder and because that evidence was uncontested at trial. *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988), *cert. denied*, *Downing v. United States*, 110 S. Ct. 732 (1990).

ISSUE II – LESSER-INCLUDED OFFENSES

A. Petitioner's failure to raise the theft-as-a-lesser-offense issue in the Arizona Supreme Court constitutes a waiver of review of that issue by this Court.

B. Petitioner was charged with one count of murder in the first degree, not robbery or theft. Neither robbery nor theft are included within the statutory elements of murder. Therefore, neither is a lesser-included offense of murder and no instruction or verdict form was constitutionally required. *Schmuck v. United States*, 489 U.S. 705 (1989).

ARGUMENTS

IA

PETITIONER DID NOT RAISE ANY JUROR-UNANIMITY ISSUE AT EITHER OF HIS TWO TRIALS OR AT ANY TIME PRIOR TO HIS SECOND STATE APPEAL. HE IS THEREFORE NOT ENTITLED TO REVIEW OF THIS ISSUE ABSENT A DEMONSTRATION OF "PLAIN ERROR."

Whether petitioner is even entitled to review of the juror-unanimity issue depends upon the procedural doctrine of waiver. This doctrine, as it applies here, requires the criminal defendant to raise the issue of unanimity in the trial court or convince the reviewing court that the issue involves "plain error." *United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990). Plain error is highly prejudicial error that affects the substantial rights of a defendant. *United States v. Payseno*, 782 F.2d 832 (9th Cir. 1986).

Petitioner did not address the unanimity issue by request, objection, or argument until his second state appeal. (Opening Brief at 50.) His failure to give the trial court an opportunity to resolve the question constitutes a waiver of review by this Court unless he is able to show that the absence of a specific-unanimity instruction and

verdict form was highly prejudicial and thus affected his federal constitutional rights. *United States v. Peterson*, 768 F.2d 64 (2d Cir.), *cert. denied*, *Peterson v. United States*, 474 U.S. 923 (1985); *State v. Boots*, 308 Or. 371, 780 P.2d 725 (1989). The absence of an instruction, if error, was not prejudicial to any degree and therefore could not have affected petitioner's constitutional rights.

The basic right to a unanimous verdict, founded in the Sixth Amendment, is not made applicable to the states by the due process clause of the Fourteenth Amendment. *Apodaca v. Oregon*, 406 U.S. 404 (1972). Nor does the Fourteenth Amendment's right to proof beyond a reasonable doubt entitle a state criminal defendant to a unanimous jury verdict. *Johnson v. Louisiana*, 406 U.S. 356 (1972). This case law deprives petitioner's contention of any federal basis. Without a federal constitutional basis, no substantial prejudice exists.

In addition, under the state court interpretation of Arizona law, petitioner was convicted by a unanimous jury. *State v. Schad*, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989), *cert. granted*, *Schad v. Arizona*, 111 S. Ct. 243 (1990). He was entitled to a unanimous verdict with respect to the crime charged – first-degree murder – but not with respect to the manner in which that offense was committed. *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982). This is because the mental state required for first degree murder – wilful, deliberate, or premeditate - is supplied either by evidence of premeditation or, when the murder is committed during the course of a felony, by the specific intent associated with that felony. *State v. Celaya*, 135 Ariz. 248, 254, 660 P.2d 849, 855 (1983); *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982). The

manner of commission is therefore irrelevant and not subject to a separate instruction or verdict form. *State v. Woratzeck*, 134 Ariz. 452, 455, 657 P.2d 865, 868 (1982), *Woratzeck v. Ricketts*, 820 F.2d 1450 (9th Cir. 1988). Petitioner was not prejudiced by the absence of the instruction or verdict form.

The lack of prejudice is also demonstrated by the pertinent facts of this case. The only issue before the jurors was who killed Mr. Grove. Uncontested evidence established that Mr. Grove died as a result of strangulation. (R.T. of June 20, 1985, at 361.) Petitioner did not contest the evidence that established that the murder occurred during the commission of a robbery. Manual strangulation during a robbery is an act that can only be committed with premeditation.

The state of the evidence supports unanimous conclusions that the murderer was guilty of first-degree murder by premeditation and during a felony. There is no prejudice because the outcome would have been identical regardless of the instructions and verdict forms. *See Pope v. Illinois*, 481 U.S. 497 (1988) (harmless error test for invalid instruction is whether the result would have been the same with or without the instruction).

Petitioner is unable to demonstrate the requisite prejudice and consequent effect on his federal constitutional rights. He cannot show plain error. He has no right to have this issue reviewed by this Court.

IB

THE UNANIMITY DOCTRINE IS A FEDERAL RIGHT NOT APPLICABLE TO THE STATES.

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court ruled that the Sixth Amendment right to unanimity of verdict did not extend through the Fourteenth Amendment to the states. In *Johnson v. Louisiana*, 406 U.S. 356 (1972), it held that the reasonable doubt standard of proof was not violated by a lack of juror unanimity on the issue of guilt. Petitioner seeks to overturn these cases with respect to capital cases. He contends that unanimity is essential to the notions of reliability, accuracy, and community faith in jury verdicts. His contentions are founded in both the Sixth (right to trial by jury) and Fourteenth (proof beyond a reasonable doubt) Amendments.

This Court rejected each claim noted above. With respect to the Sixth Amendment issue, the purpose of a jury trial – prevention of oppression by the court or prosecutor – was held to be protected by the "interposition between the accused and his accuser of the common sense judgment of a group of laymen." *Apodaca v. Oregon*, 406 U.S. at 410, quoting from *Williams v. Florida*, 399 U.S. 78, 100 (1970). Unanimity, said the court:

> [D]oes not materially contribute to the exercise of this common sense judgment . . . as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt.

Id. at 410-11. This rationale is applicable to capital cases as well as noncapital. The concern of the defendant

remains the same in both capital and noncapital cases: protection from the overzealous prosecutor. The method of protection is the same in both instances. The interests of all parties are well served by either unanimity or nonunanimity. *Apodaca*, 406 U.S. at 411.

Likewise inapplicable to juror unanimity contentions is the Fourteenth Amendment's standard of proof requirement – beyond a reasonable doubt – discussed in *In re Winship*, 397 U.S. 358 (1970). "[T]he Sixth Amendment has never been held to require proof beyond a reasonable doubt in criminal cases." *Apodaca v. Oregon*, 406 U.S. at 411. Nor is the lack of juror unanimity "to be equated with the existence of a reasonable doubt." *Johnson v. Louisiana*, 406 U.S. at 363. The lack of unanimity does not deprive a criminal defendant of the right to proof beyond a reasonable doubt. There is no denial of due process of law. *Id.*

These opinions are directly on point and contrary to petitioner's contentions. There is no federal constitutional basis for petitioner's argument. A unanimous verdict is not constitutionally required in capital cases.

IC

THE VERDICT IN THIS CASE SATISFIED THE UNANIMITY DOCTRINE DESCRIBED IN *JOHNSON V. LOUISIANA* AND *APODACA V. OREGON*.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court held that the Sixth Amendment right to trial by jury is extended to the states by the Fourteenth Amendment. In *Williams v. Florida*, 399 U.S. 78 (1970), this Court limited the scope of *Duncan* by ruling that a 12-person jury was

not constitutionally required. *Duncan* was further restricted by the holding in *Apodaca v. Oregon*, 406 U.S. 404 (1972), that the Sixth Amendment right to jury unanimity in federal criminal trials was not applicable to the states. In *Johnson v Louisiana*, 406 U.S. 356 (1972), the Court held that even the due process clause of the Fourteenth Amendment does not contain a right to a unanimous jury verdict. This Court has thus given the states the opportunity to set their own standards with respect to juror unanimity, so long as that standard is consistent with the standards of a fair trial. *See Burch v. Louisiana*, 441 U.S. 130 (1979) (six-person jury for nonpetty offense must be unanimous).

The Arizona Constitution mandates unanimous verdicts in all criminal trials. Ariz. Const. art. II, § 23. With respect to the first degree murder statute, the Arizona Supreme Court has consistently held that the above constitutional provision is satisfied by a general jury verdict of guilty of first-degree murder.

> The defendant is entitled to a unanimous jury verdict on whether murder has been committed.

State v Arnett, 158 Ariz. 15, 20, 760 P.2d 1064, 1069 (1988). Regardless of the unanimity doctrine's application to the states, Arizona is in full compliance.

In this case, the trial court instructed the jurors that their verdict must be unanimous. (J.A. No. 27.) The jurors returned a unanimous verdict and a poll was taken to assure that unanimity. (R.T. of June 27, 1985, at 1411-13.) The unanimity doctrine associated with the Sixth Amendment was satisfied in this case.

ID

THE SPECIFIC-UNANIMITY DOCTRINE SOUGHT BY PETITIONER IS A RULE OF PROCEDURE FOR FEDERAL TRIALS AND IS NOT APPLICABLE TO THE STATES.

Petitioner contends that, in addition to the Sixth Amendment's right to trial by jury and the associated right to a unanimous jury verdict, there exists a constitutional right in capital cases to have the jurors unanimously agree on the specific manner in which the murderer killed his victim. If a specific-unanimity doctrine does exist, it is based on the federal rules of procedure and is therefore not applicable to the states.

Rule 31(a) of the Federal Rules of Criminal Procedure requires only that "[t]he verdict shall be unanimous." A general instruction is normally sufficient to advise jurors of their duty with respect to the issue of guilt. *United States v. Peterson*, 768 F.2d 64 (2d Cir.), *cert. denied*, *Peterson v. United States*, 474 U.S. 923 (1985). No court has attempted to extend this federal rule of procedure to the states.

In 1977, the Fifth Circuit Court of Appeals interpreted the Sixth Amendment as mandating expansion of this Court's definition of unanimity to require that the jurors in a *federal* criminal trial be in "substantial agreement" with respect to the defendant's "course of action" where the charged acts fall into more than one "distinct conceptual grouping." *United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977). The decision, based on this Court's *Johnson* and *Apodaca* opinions, concluded:

> Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required.

553 F.2d at 458 (footnote omitted). Even as the Fifth Circuit applied Rule 31(a) to the Sixth Amendment, it acknowledged that its ruling would not extend to the states through the Fourteenth Amendment. *Id.* at 456.

If this Court's rationale in *Johnson* and *Apodaca* is valid, this component of the general unanimity doctrine likewise does not apply to the states through the Fourteenth Amendment. The unanimity clause of the Sixth Amendment is not fundamental to the essentials of a jury trial because the jury, a panel of one's peers, is considered sufficient protection against arbitrary law enforcement. *Johnson v. Louisiana*, 406 U.S. at 373 (Powell, J., concurring). This preexisting protection will not be enhanced by application of a portion of a federal right that this Court deems unnecessary to assure the constitutional reliability of a state criminal trial. Therefore, there is no federal constitutional basis for extending the specific-unanimity doctrine to the states, not even in capital cases.

IE

IF THE SPECIFIC-UNANIMITY DOCTRINE IS APPLICABLE TO THE STATES, THE ARIZONA FIRST-DEGREE MURDER STATUTE IS IN FULL COMPLIANCE.

In 1903, the first reported issue of specific-unanimity arose in a New York criminal trial. The defendant was charged with first-degree murder and the evidence supported both premeditation and commission during a felony. The court of appeals reviewed the elements of the state statute to determine if the legislature intended to prohibit a single offense that could be committed in alternative ways or to create distinct and separate offenses. It concluded that first-degree murder, as described by the

New York statute, was but a single offense and proof that the defendant killed either with premeditation or while engaged in the commission of a felony established guilt. It is unreasonable, said the court, to permit a defendant to escape conviction because of a difference of opinion among jurors about how the defendant murdered his victim when all agree that the defendant did do it. *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903).

A multitude of state appellate courts have utilized the *Sullivan* standard in deciding whether a trial court should instruct the jurors on separate or single offenses in both murder and nonmurder cases. *See, e.g., People v. Travis*, 170 Ill. App. 3d 873, 525 N.E.2d 1137 (1988), *cert. denied, Travis v. Illinois*, 489 U.S. 1024 (1989) (murder); *Holland v. State*, 91 Wis. 2d 134, 280 N.W.2d 288 (1979), *cert. denied, Holland v. Wisconsin*, 445 U.S. 931 (1980) (murder); *State v. Hazelett*, 8 Or. App. 44, 492 P.2d 501 (1972) (murder); *State v. Duncan*, 312 N.W.2d 519 (Iowa 1981) (burglary); *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978) (assault). The majority of those jurisdictions have adopted the *Sullivan* rationale and conclude that first-degree murder is one offense that may be committed in various ways, not separately charged offenses. Annot., *Jury Unanimity-Mode of Offense*, 75 A.L.R.4th 91 (1990).

In this case, the indictment charged petitioner with the murder of Lorimer Grove in violation of Arizona Revised Statutes §§ 13-451, -452, and -453.[1] (J.A. at 2.) The applicable portion of the cited statutes reads:

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[1] Arizona Revised Statutes §§ 13-451, -452, and -453 were repealed on October 1, 1978. All subsequent references to these statutes will be as they existed before the date of repeal.

> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree.

Arizona adopted this statute from California. Arizona Penal Code, §§ 170-72 (1913). The California Supreme Court interpreted its statute consistent with *Sullivan*, holding that, when one crime is charged in the indictment, the only issue before the jurors is whether the defendant was guilty of that crime. It is not necessary for the jurors to agree unanimously upon the theory of commission. *People v. Chavez*, 37 Cal. 2d 656, 234 P.2d 632 (Cal. 1951); *People v. Adcox*, 47 Cal. 3d 207, 253 Cal. Rptr. 55, 763 P.2d 906 (1988), *modified* (1989), *cert. denied, Adcox v. California*, 110 S. Ct. 1500 (1990).

Arizona has followed the lead of California and New York. In *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982), the state supreme court addressed a duplicitious-charge argument and rejected the contention that the statute defined two separate offenses – murder by premeditation and murder during a felony. It held instead that first-degree murder was a single offense capable of commission in alternative ways.

Shortly thereafter, the court applied *Axley* to a murder trial that raised the issue whether a single verdict denied the defendant a state constitutional right to a unanimous jury verdict. The supreme court held:

> In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. Although a

> defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict of the precise manner in which the act was committed.

State v. Encinas, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) (citations omitted); *see also State v. Lopez*, 163 Ariz 108, 111, 786 P.2d 959, 962 (1990); *State v. Smith (Edward)*, 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989); *State v. Arnett*, 158 Ariz. 15, 19-20, 760 P.2d 1064, 1068-69 (1988); *State v. Berndt*, 138 Ariz. 41, 45, 672 P.2d 1311, 1315 (1983); *State v. Hallman*, 137 Ariz. 31, 38, 668 P.2d 874, 881 (1983); and *State v. Smith (Roger)*, 136 Ariz. 273, 277, 665 P.2d 995, 999 (1983).

Federal case law has developed similarly to state law. In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the Fifth Circuit reviewed a federal conviction under 18 U.S.C. § 2313. That statute prohibited the receipt, concealment, storage, barter, sale, or disposal of a stolen motor vehicle. During deliberations, the jurors inquired if the counts were separate or singular. The trial court instructed that, if all jurors agreed that the defendant did some of the acts but did not agree on which, they could still find him guilty of selling or receiving a motor vehicle. The defendant objected that the instruction violated his right to a unanimous verdict. The circuit court initially recognized that the unanimity doctrine, founded in Rule 31(a) of the Federal Rules of Criminal Procedure and the Sixth Amendment, was a federal rule not applicable to state proceedings. *Id.* at 456. It then considered the applicability of the unanimity doctrine to a charge that prohibits several acts and yet permits the jurors to return a general guilty verdict even though they are not in

agreement about which act the defendant committed. The court focused on the actus reus as charged in the indictment and asked whether those acts were so conceptually distinct that a general verdict would not permit unanimity. The standard the circuit court applied is:

> [Whether] the acts are sufficiently analogous to permit a jury finding of the *actus reus* element of the offense to be deemed "unanimous" despite differences among the jurors as to which of the intragroup acts the defendant committed.

Id. at 458. Or conversely:

> [Whether] the two conceptual groupings are sufficiently different so that a jury finding of the *actus reus* element of the offense would not be "unanimous" if some of the jurors thought the defendant committed only an act in the first conceptual grouping while others believed he committed an act only in the second.

Id. Under the federal statute at issue, the court held that there were two distinct conceptual groupings within the six listed acts; receiving, concealing, and storing, and bartering, selling, and disposing. The court concluded that the trial court's instruction misled the jurors and permitted a less-than-unanimous verdict in violation of the Sixth Amendment. *Id.* Within each group, however, the acts were deemed sufficiently analogous to permit a unanimous verdict notwithstanding potential juror dissension about which of those acts the defendant committed. The question presented by the *Gipson* court is whether the charged offense contains conceptually distinct or analogous acts or groupings.

The federal and state standards are conceptually identical. Each recognizes that unanimity is required in obtaining a conviction. Each focuses upon the elements of the statute as described in the charge to evaluate the legislative intent in describing single or multiple offenses. Each concludes that a statute may describe a single offense that may be committed in alternate ways and therefore, unanimity is not procedurally, statutorily, or constitutionally required to distinguish between the listed methods of commission. The only issue remaining is whether Arizona's first-degree murder statute describes a single offense or conceptually distinct offenses.

State and federal appellate courts that have considered this issue have established a number of factors that reflect whether the legislature intended to fashion singular or multiple offenses, including; statute title, language, and legislative history, *State v. Tillman*, 750 P.2d 546 (Utah 1987), *Ward v. State*, 758 P.2d 87 (Alaska 1988), whether the acts are connected, consistent, or repugnant (proof of one disproves the other), *State v. Duncan*, 312 N.W.2d 519 (Iowa 1981), *State v. Hazelett*, 8 Or. App. 44, 492 P.2d 501 (1972), whether the defendant can be convicted of multiple offenses under one statute, *State v. Arnett*, 158 Ariz. 15, 18-19, 760 P.2d 1064, 1067-68 (1988), *Rice v. State*, 311 Md. 116, 532 A.2d 1357 (1987); or punished twice for conviction under that statute, *State v. Edwards*, 163 Conn. 527, 316 A.2d 387 (1972); and whether conviction under either of the alternate acts would result in the same legal consequences, *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978).

Application of the above factors to the Arizona statute supports the Arizona Supreme Court's pronouncement that first-degree murder defines a single offense that may be committed in alternate ways rather than separate, distinguishable offenses of premeditated and felony murder.

1. Statutory title and language

Arizona Revised Statutes § 13-452 is entitled *Degrees of Murder*. The title reflects an intent to divide the crime of murder into degrees but not into separate offenses within those degrees. The statutory language supports this conclusion. The legislature defined murder in Arizona Revised Statutes § 13-451 as a malicious killing. In a separate statute, it established two degrees of murder distinguished only by the defendant's state of mind. Arizona Revised Statutes § 13-452. The gravamen of the offense is the act of killing, not premeditating or robbing. Whether an accused kills with premeditation or kills during a robbery is irrelevant to prove the act of murder; the defendant's conduct is relevant only to establish the degree of the offense and therefore, the punishment. Those acts constitute the factual basis of the crime, not the offense itself. The method of accomplishing the killing is therefore immaterial to unanimity of the verdict. *Cardin v. State*, 73 Md. App. 200, 533 A.2d 928 (Md. App. 1987), *cert. denied, Cardin v. Maryland*, 488 U.S. 827 (1988) (deprivation of ownership is the focus of the theft statute, not how the theft was committed). The statutory title and language support the state court's conclusion that first degree murder is but one offense.

2. Legislative history

As noted above, Arizona adopted its statute from California. Both the California and Arizona appellate courts have concluded that the respective legislatures intended to define single rather than separate offenses. *People v. Chavez*, 37 Cal. 2d 656, 234 P.2d 632 (1951); *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982). This factor weighs in favor of a singular offense.

3. Connected and Consistent, or Repugnant Acts

This factor also weighs in favor of a finding of a singular offense. The Arizona Supreme Court has held that first-degree murder is one offense, primarily because the crime focuses on the act of killing, but also because of the connection between the alternative acts. *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982) (the premeditation element required to prove first degree murder is supplied by the intent required for the underlying felony). By proving that a killing occurred during a robbery, the state also proves premeditation. *Id.* This connection between the alternative acts provides for consistency, not repugnance. This factor weighs in favor of a singular act.

4. Multiple conviction or punishment

The Arizona Supreme Court has consistently held that first-degree murder is one offense. *State v. Smith (Roger)*, 136 Ariz. 273, 277, 665 P.2d 995, 999 (1983). Implicit in that determination is the conclusion that a

defendant cannot be convicted or punished for both murder by premeditation and murder by felony. This factor weighs in favor of finding a singular offense.

5. Legal consequence of conviction

Arizona Revised Statutes § 13-453(A) sets forth the punishment possible upon conviction of first-degree murder; death or imprisonment for life. There is no statutory distinction between murder by premeditation and murder by felony. Because first-degree murder is only one offense, *State v. Berndt*, 138 Ariz. 41, 45, 672 P.2d 1311, 1315 (1983), the legal consequence for commission of that crime is not dependent upon the method of conviction. This factor thus weighs in favor of finding a single offense.

The above factors exist for one purpose; to prevent juror confusion about which offense is at issue. *United States v. Bedonie*, 913 F.2d (10th Cir. 1990); *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986), *cert. denied*, *Schiff v. United States*, 480 U.S. 945 (1987); *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). The Arizona murder statute does not create confusion. Arizona Revised Statutes § 13-451 defines murder as a killing with malice aforethought. Arizona Revised Statutes § 13-452 divides murder into two degrees, not separate categories. Under this latter statute, jurors can find that the murder was committed with premeditation or during a felony or both. If some find murder by premeditation and some find murder by felony, there is no confusion because both methods result in the same conclusion; the defendant has committed first-degree murder. *State v. Arias*, 131 Ariz.

441, 443, 641 P.2d 1285, 1287 (1982) (the specific intent required for the felony substitutes for premeditation). Because the commission of a felony establishes premeditation, the verdict is unanimous regardless of how the jurors voted.

The Arizona statute satisfies all of the factors that indicate that a statute defines a single offense. It does not present a genuine possibility that the jurors will be confused about what conduct constitutes the offense of first degree murder. Even if the federal specific-unanimity doctrine does apply to state capital trials, it does not apply here.

IF

EVIDENCE THAT THIS MURDER WAS COMMITTED BOTH WITH PREMEDITATION AND DURING THE COURSE OF A FELONY IS OVERWHELMING. IT WAS ALSO UNCONTESTED AT TRIAL. THESE FACTS RENDER HARMLESS ANY ERROR THAT MIGHT BE ASSOCIATED WITH THE LACK OF A SPECIFIC-UNANIMITY INSTRUCTION AND VERDICT FORM.

The evidence in this case established that someone strangled Lorimer Grove and took his automobile, travel trailer, checkbook, wallet, cash, and credit cards. Petitioner did not contest the sufficiency of that evidence at trial or on direct appeal. The only question raised by petitioner was who committed that murder. By direct and cross-examination and argument to the jurors, counsel attempted to counter the state's evidence that connected petitioner to the murder by alluding to the possibility that someone else killed Mr. Grove: perhaps the Tison gang (*see Tison v. Arizona*, 481 U.S. 137 (1987), or some

unknown person that Mr. Grove might have treated to lunch in Sedona, Arizona, over a month before the murder. The defense urged the jurors to find that petitioner merely possessed Mr. Grove's belongings without having murdered him to acquire them. (R.T. of June 27, 1985, at 1381.)

Where there is but one crime charged – first degree murder – and the only issue is who committed it, the manner of commission becomes irrelevant. *State v. Tillman*, 750 P.2d 546 (Utah 1987). The harmless error doctrine set forth in *Chapman v. California*, 386 U.S. 18 (1967), is applicable when it is clear beyond a reasonable doubt that if error existed, it had no effect on the verdict. The manner in which Mr. Grove was murdered was never questioned at trial and therefore could not have affected the verdict. If the jurors found that petitioner was the perpetrator, his guilt was established without regard to the manner of its commission. If it was error to not instruct the jurors as petitioner now requests, the error was harmless beyond a reasonable doubt.

Petitioner's failure to request the instruction and verdict form is additional support for application of the harmless error doctrine. *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988), *cert. denied*, *Downing v. United States*, 110 S. Ct. 732 (1990); *Scarborough v. United States*, 522 A.2d 869 (D.C. App. 1987). Petitioner sought only to challenge the state's evidence of identity and not the crime or the manner of its commission. Any contention that the murder was not premeditated or did not occur during a felony would be inconsistent with and serve to dilute his

primary defense. The failure to request a specific-unanimity instruction supports a finding of harmless error. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977).

Finally, the state court's interpretation of the first-degree murder statute renders any error harmless beyond a reasonable doubt. In Arizona, first-degree murder is a single offense regardless of the method of commission. *State v. Sanchez*, ___ Ariz. ___, 797 P.2d 703 (Ct. App. 1990). If the offense is committed during one of the listed felonies, the specific intent required for that felony fulfills the mental element required for first degree murder; i.e., proof of a killing during the commission of robbery is the equivalent of proof of a killing with premeditation. *State v. Celaya*, 135 Ariz. 248, 254, 660 P.2d 849, 855 (1983); *see also State v. Wilson*, 220 Kan. 341, 552 P.2d 931, *overruled*, 597 P.2d 1108 (1976) (proof of a killing during the perpetration of a felony is tantamount to proof of a killing with premeditation).

The harmless error doctrine applies because any of the jurors who found that the murder occurred during a felony necessarily found premeditation. *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982); *see also United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990) (even if the evidence permitted the jurors to be split on the theory underlying the first degree murder conviction, the elements of arson-murder would necessarily have been unanimously established). Either or both methods satisfy the Arizona statute and the outcome could not have been affected. The facts and the law render any error harmless in this case.

IIA

PETITIONER'S FAILURE TO SEEK DIRECT APPELLATE REVIEW OF THE THEFT-AS-A-LESSER-INCLUDED-OFFENSE-OF-ROBBERY ISSUE CONSTITUTES A WAIVER OF THAT ISSUE IN THIS COURT.

Petitioner contends that he was entitled to an instruction and verdict form on robbery as a lesser-included offense of first-degree murder committed in the course of a felony (with robbery as the lesser-included offense) and an additional instruction and verdict form on theft as a lesser-included offense of robbery. He is not entitled to review of the latter because he never sought or received a final judgment on this issue in the Arizona Supreme Court.

This Court's jurisdiction to review state court decisions is limited by 28 U.S.C. § 1257 to final judgments and decrees rendered by the state's highest court. *Costarelli v. Massachusetts*, 421 U.S. 193 (1975). Where the state court has not rendered a judgment on the issue presented on certiorari, this Court lacks the jurisdiction to consider that issue. See *Burns v. Ohio*, 360 U.S. 252 (1959).

Petitioner requested a theft instruction at trial but he did not request a verdict form. (*Id.* at 3-5.) On direct appeal, petitioner did not challenge the trial court's refusal to instruct the jurors on theft as a lesser-included offense or the lack of a verdict form to that effect. (Appellant's Opening Brief, Arizona Supreme Court, at 17.) The Arizona Supreme Court did not address any theft issue in its opinion. (J.A. at 30-55.) The only lesser-included issue on appeal concerned robbery. (*Id.* at 39-40.) Consequently,

this Court lacks the jurisdiction necessary to review the theft-as-a-lesser-included-offense issue.

IIB

UNDER THE STATUTORY-ELEMENTS TEST AS APPLIED TO ARIZONA REVISED STATUTES §§ 13-451 AND 452, ROBBERY IS NOT A LESSER-INCLUDED OFFENSE OF FIRST-DEGREE MURDER.

Petitioner contends that *Beck v. Alabama*, 477 U.S. 625 (1980), requires an instruction and verdict form for robbery as a lesser-included offense of first-degree murder when the evidence supports a finding that the murder was committed in the course of a robbery. He urges this Court to adopt a due process requirement in capital cases that permits jurors to return a verdict on any offense less than first-degree murder that is supported by the evidence produced at trial. The law is contrary to his position.

In *Beck*, this Court held that failure to give the jurors a third option of convicting of a lesser-included offense in capital cases violated due process. That case involved an Alabama statute that prohibited giving a lesser-included offense instruction in a capital case. The state conceded that Beck would have been entitled to the lesser-included instruction as a matter of law had the statute not prohibited doing so. *Beck* is necessarily restricted to situations that involve lesser-included offenses. Neither robbery nor theft are lesser-included offenses under either federal or Arizona law. Therefore, *Beck* is inapplicable to this case.

This Court recently adopted a new standard for determining whether one offense is included within the

offense charged in the indictment. *Schmuck v. United States*, 489 U.S. 705 (1989). Rejecting the previously employed "inherent relationship" test, the Court held that a necessarily-included offense would require comparison of the statutory-elements of both offenses to determine whether the elements of the lesser offense are necessarily included within the elements of the charged offense. Is it possible, asked the Court, to commit the greater offense without necessarily committing the lesser? Does proof of the greater offense invariably require proof of the lesser? Does the lesser statute contain all of the elements of the greater, minus one? If the lesser statute contains an element that is not contained in the greater statute, it is not a "lesser-included" offense. *Id.*

Arizona determines the existence of a lesser-included offense by the same statutory-elements standard imposed on the federal courts by *Schmuck*. *State v. Mounce*, 150 Ariz. 3, 5, 721 P.2d 661, 663 (Ct. App. 1986); *State v. Poehnelt*, 150 Ariz. 136, 148, 722 P.2d 304, 316 (Ct. App. 1985). The same rationale has been applied to this state's lesser-offense analysis as was applied in *Schmuck*. Rule 23.3, Ariz. R. Crim. P.; *State v. Kinkade*, 147 Ariz. 250, 253, 709 P.2d 884, 887 (1985) (possible to commit the greater without necessarily committing the lesser); *State v. Tims*, 143 Ariz. 196, 198-99, 693 P.2d 333, 335-36 (1985) (lesser contains all the elements of the greater minus one); *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983) (evidence must support the lesser). This issue must be resolved by comparison of the pertinent statutory elements, not the inherent relationship of the offenses as presented by the evidence at trial.

The first-degree murder statute reads, in pertinent part, as follows:

> Murder is the unlawful killing of a human being with malice aforethought. . . .
>
> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree.

Arizona Revised Statutes §§ 13-451, -452. Robbery is defined as:

> [T]he felonious taking of personal property in the possession of another from his person, or immediate presence, and against his will, accomplished by means of force or fear.

Comparison of the elements of these two statutes results in the conclusion that robbery, as a matter of law, is not a lesser-included offense of first-degree murder because the elements of robbery (taking of personal property by force or fear) differ from the elements of murder (wilful, deliberate, or premeditated killing with malice). Proof of murder does not invariably require proof of robbery. Murder can be committed by poison, lying in wait, torture, avoiding or preventing escape, arson, rape, burglary, kidnapping, mayhem, or sexual molestation, all of which are independent of the statutory elements of robbery. Robbery does not contain all of the statutory

elements of first-degree murder minus one. In fact, robbery contains none of the elements of murder. The statutory-elements test conclusively eliminates robbery as a lesser-included offense of first-degree murder.

Petitioner's contention is loosely based on the "inherent relationship" standard (the evidence supports a conviction of any lesser offense). The *Schmuck* opinion rejected that analysis for determining lesser offenses and substituted the statutory-elements standard set forth above. *Beck* remains applicable only where the statutory elements of the lesser offense are a subset of the statutory elements of capital murder. Whether the evidence in this case was sufficient to sustain a conviction of robbery as well as first-degree murder is irrelevant because robbery is statutorily distinguishable from murder. Under *Schmuck*, petitioner was not entitled to either instruction or verdict form for the offense of robbery.

In addition, *Beck* was satisfied in this case by the instruction and verdict form given for second degree murder. (J.A. at 27-28.) The jurors were indeed permitted to consider a verdict of guilt of a lesser-included noncapital offense, the "third option" requirement instituted by *Beck*. They rejected that third option in favor of the first; guilty of first-degree murder. Due process was satisfied.

Petitioner attacks the Arizona rule that no lesser-included offense exists for the crime of "felony murder." He is dissatisfied with the court's explanation that the underlying felony supplies the *mens rea* necessary to satisfy the premeditation element of first-degree murder. (Brief For Petitioner at 24.) His argument ignores the rule

of law that coexists with the above-stated rule: In Arizona, first-degree murder is a single offense that may be committed in more than one way. *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982).

The result of these holdings is that, in Arizona, there is no separate offense of felony murder. A person commits first-degree murder by killing another with malice aforethought and does so wilfully, deliberately, or with premeditation, or while committing or attempting to commit a listed felony, which felony substitutes the *mens rea* necessary to satisfy the premeditation element. *State v. LeGrand (Walter)*, 153 Ariz. 21, 30, 734 P.2d 563, 572, *cert. denied, LeGrand v. Arizona*, 484 U.S. 872 (1987). When the Arizona Supreme Court states that there is no lesser-included offense for felony murder, it necessarily incorporates these previous decisions and concludes that proof of the commission of a felony is not invariably necessary to prove first-degree murder. Because robbery is not necessarily required to prove murder, it cannot constitute a lesser-included offense. *State v. Mounce*, 150 Ariz. 3, 5, 721 P.2d 661, 663 (Ct. App. 1986). Due process does not require instructing on a lesser-included offense where there is no lesser-included offense. *Beck v. Alabama*, 447 U.S. at 636.

Petitioner's contention with respect to theft as a lesser-included offense is wholly without merit. He argues that robbery is a lesser-offense of murder by felony and theft is a lesser offense of robbery. (Brief for Petitioner at 22-23.) In addition, he submits that the evidence supports a reasonable inference that he acquired Mr. Grove's property without force, fear, or murder. (*Id.*) Consequently, he proposes that *Beck* required that the

jurors be permitted to find him guilty of theft as a lesser-included offense of robbery, which was a lesser-included offense of first-degree murder by felony. This convoluted rationale is without legal or factual basis.

Respondent has discussed above why robbery, as a matter of law, is not a lesser-included offense of first-degree murder-felony. In addition, petitioner's attempt to extend *Beck* is not justified by the rationale on which that case is founded. The Court in *Beck* began its analysis by recognizing the rule that the jurors could return a verdict on any offense "necessarily included in the offense charged." 447 U.S. at 633. The flaw in petitioner's argument is that theft is not a lesser-included offense of first-degree murder; it is a lesser-included offense of robbery. The jurors could not return a guilty verdict for an offense that is neither charged nor necessarily-included within the charged offense. *Beck* does not require the trial court to instruct on any offense that may be proved by the evidence, only those that are included within the charged offense. Petitioner was not entitled to have the jurors instructed on theft as a lesser offense of first degree murder.

Finally, petitioner was not entitled to a lesser-included offense instruction and verdict form for theft because there was no evidence to support either. An instruction on a lesser-included offense can be given only "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S 205 (1973). Due process prohibits instructing on a lesser-included offense where there is no supporting evidence. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

Further, under Arizona law, for a defendant to be entitled to a lesser-included offense instruction, there must be some affirmative evidence to support the lesser offense; the mere possibility that the jurors might choose to disbelieve a portion of the state's case does not entitle the defendant to a lesser-included offense instruction. *State v. Leon*, 104 Ariz. 297, 300, 451 P.2d 878, 881 (1969); *State v. King*, 67 Ariz. Adv. Rep. 56 (Ct. App., Aug. 23, 1990). In the present case, petitioner presented absolutely no evidence how he acquired Mr. Grove's car or credit cards or checkbook. He did not testify. He did not present any witnesses to testify that the items were stolen rather than taken during a robbery. His cross-examination of state witnesses did not produce any evidence to show how he came to possess Mr. Grove's property. The defense focused exclusively on identity of the killer, not on petitioner's acquisition of the property. The theft theory was produced from counsel's argument, not testimony. (J.A. at 23.) Argument is not evidence.

This lack of evidence destroys any support that petitioner might otherwise have had for a lesser-included offense instruction. There was no due process violation under *Beck* because petitioner was not entitled to a lesser-included instruction.

CONCLUSION

In order for petitioner to prevail, this Court has to overrule both *Johnson* and *Apodaca* and extend the Sixth Amendment unanimity doctrine to state capital cases. That would not provide petitioner any greater protection

than he now receives under the existing interpretations of both federal and state constitutions. There is no purpose to be served by disturbing settled law. If, however, the federal constitutional provision is extended to Arizona Revised Statutes §§ 13-451 and -452, petitioner was not entitled to a specific verdict because murder in Arizona consists of a single offense that results in unanimity of verdict regardless of the mode of commission, not conceptually distinct acts that require separate verdicts to insure unanimity.

Robbery is not a lesser-included offense of the crime of first-degree murder even if the murder is committed during a robbery. The due process clause of the Fourteenth Amendment was satisfied by giving the jurors the opportunity to find petitioner guilty of second-degree murder, a noncapital offense.

For the above-stated reasons, respondent urges this Court to reject petitioner's contentions and uphold the opinion of the Arizona Supreme Court.

Respectfully submitted,

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